IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIVIAN LOBIANCO, as Administrator of the Estate of JOSEPH LOBIANCO, and VIVIAN LOBIANCO	:	**CIVIL ACTION**
v.	:	**NO. 03-145**
ECKERD CORPORATION	:	
v.	:	
MCKESSON DRUG COMPANY	:	

MEMORANDUM AND ORDER

Savage, J. **December 29, 2004**

At the summary judgment stage in this diversity action, the issue is whether the plaintiff has produced sufficient evidence from which a reasonable jury could find that the defendants' undisputed negligence caused any harm to the plaintiff's late husband. The plaintiff claims her husband's cancer was not treated timely and he unnecessarily suffered greater pain as his disease progressed because a drug taken by him was ineffective as a result of the defendant Eckerd Corporation's ("Eckerd") failure to properly handle and store it. Eckerd joined its supplier of the drug, McKesson Drug Company ("McKesson"), as a third-party defendant, alleging that it had failed to refrigerate the drug during shipment as required and to properly label it.

Eckerd and McKesson have jointly moved for summary judgment, contending that the plaintiff has failed to produce any evidence that their negligence caused the decedent any harm. After a thorough review of the record in a search for any factual dispute on the issue of causation, we find that the plaintiff has presented no evidence linking the failure

to refrigerate the drug with her husband's continued suffering, his death or any other injuries or damages. Therefore, because the plaintiff cannot demonstrate that the failure to refrigerate the drug and to warn that it required refrigeration caused her husband any harm, we must grant the motion for summary judgment.

Background

In March 2001, Joseph LoBianco ("LoBianco"), who had been previously treated for prostate cancer some years earlier, was diagnosed with recurrent prostate cancer and carcinosarcoma, a rare and aggressive form of incurable cancer. His treating physician, Dr. David Topolsky, M.D. ("Topolsky"), informed him that the median expected survival period for someone with his diagnosis was 12 months. Because the cancer was immedicable, palliation was the only realistic goal.[1] In May 2001, in an attempt to retard the cancer growth and alleviate LoBianco's symptoms, Topolsky prescribed chemotherapy treatment consisting of two drugs, Taxotere and Emcyt.[2] The Taxotere was administered in Topolsky's office. Emcyt was obtained by prescription.

Prior to August 2001, LoBianco had three Emcyt prescriptions filled, the first two in May 2001 by Eckerd, and the last one, in late June 2001, by the Veterans Administration ("VA"). None of the prescriptions filled at Eckerd had been refrigerated at the store. The prescription from the VA had been mailed to LoBianco in "cold packs."[3] LoBianco did not refrigerate any of these prescriptions at his home.

In August 2001, after returning home from Eckerd with another Emcyt prescription,

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[1] *Topolsky Dep.* at 32, 36 (*Joint Mot. Summ. J.*, Ex. E).

[2] *Topolsky Dep.* at 37-40, 66-69 (*Joint Mot. Summ. J.*, Ex. E).

[3] *LoBianco Dep.* at 63-64 (*Pl. Resp. Mot. Summ. J.*, Ex. C).

LoBianco noticed a package insert that warned that the drug "must be refrigerated."[4] Alarmed, LoBianco immediately returned to the local Eckerd pharmacy where he had had the prescriptions filled and questioned the pharmacist about the refrigeration warning.[5] According to LoBianco, the pharmacist told him that Emcyt is useless if not kept refrigerated.[6]

Before he died,[7] LoBianco filed suit against Eckerd, alleging failure to refrigerate the drug and to properly warn that it required refrigeration.[8] Eckerd filed a third-party complaint against McKesson, claiming that McKesson had failed to ship the drug cold and had failed to label the shipment properly. McKesson filed a third-party complaint against Pharmacia and Upjohn Company ("Pharmacia"), the manufacturer, asserting an inadequate labeling theory of negligence. Eckerd later joined the VA,[9] contending that it had shipped the prescription to LoBianco without proper instructions to refrigerate it.

Following the close of discovery, Eckerd and the third-party defendants filed a joint motion for summary judgment in which they argue that the plaintiff can not demonstrate that the failure to refrigerate the drug caused LoBianco any harm. The United States of America, on behalf of the VA, filed a separate motion for summary judgment against

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[4] *LoBianco Dep.* at 23-24 (*Pl. Resp. Mot. Summ. J.*, Ex. C).

[5] *LoBianco Dep.* at 23-24 (*Pl. Resp. Mot. Summ. J.*, Ex. C).

[6] *LoBianco Dep.* at 28 (*Pl. Resp. Mot. Summ. J.*, Ex. C).

[7] LoBianco was deposed on June 27, 2003. He died on October 16, 2003. His wife, as the administrator of his estate, was later substituted as the plaintiff.

[8] *Compl*. ¶ 32.

[9] The plaintiff originally named the VA as a defendant. On April 28, 2004, we granted the United States of America's motion to substitute it as the proper defendant.

Eckerd; and, Pharmacia moved for summary judgment against McKesson. Eckerd also filed a *Daubert*[10] motion seeking to preclude the plaintiff's causation expert, Dr. Topolsky, from testifying because his opinions lack the necessary factual bases and scientific data to conclude that the drug was ineffective when taken.

After oral argument, summary judgment was granted in favor of the United States of America because there was no evidence that the prescription filled by the VA had not been stored and labeled properly. Judgment was entered in favor of Pharmacia because McKesson could not show that the manufacturer had shipped the drug without adequate labeling. Thus, Eckerd and McKesson are the only remaining defendants.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). In examining the motion, we must view the facts in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159-60 (3d Cir. 2003).

The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact. FED. R. CIV. P. 56(c). Once the movant has done so, the opposing party cannot rest on the pleadings. To defeat summary judgment, she must come forward with probative evidence establishing the *prima facie* elements of her claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The nonmovant must show more than the "mere existence of a scintilla of evidence" for

[10] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

elements on which she bears the burden of production. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). An inference based upon speculation or conjecture does not create a material fact. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

In support of the joint motion, Eckerd and McKesson have presented a statement of material facts they contend are undisputed. In her counterstatement of facts, the plaintiff does not cite to contradictory facts in the record, nor does she dispute facts that are fatal to her cause of action.[11] In short, she does not raise issues of material facts necessary to defeat summary judgment.

Causation

Harm caused by the defendant's breach of a duty is an essential element of a cause of action for negligence. *Feeney v. Disston Manor Pers. Care Home*, 849 A.2d 590, 594 (Pa. Super. 2004).[12] Thus, the plaintiff must prove that the defendants' failure to discharge a duty they owed to the decedent caused him injury. *Id.*

At issue is not whether the defendants failed in their duty to refrigerate the drug and to warn that it had to be refrigerated. The question is whether there is any evidence that the undisputed lack of refrigeration caused harm to the decedent.

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[11] Paragraph 6(c) of the Scheduling Order states that "[a]ll material facts set forth in the Statement of Undisputed Facts required to be served by the movant shall be taken by the Court as admitted unless controverted by the opposing party." (Document No. 7).

[12] A federal court exercising diversity jurisdiction applies the substantive law of the forum state. *Glenn Distribs. Corp. v. Carslisle Plastics, Inc.*, 297 F.3d 294, 300 n.3 (3d Cir. 2002).

On the causation issue, the plaintiff relies upon her expert, Dr. Topolsky, a specialist in urology and oncology, who opined in his report that effective Emcyt "could have slowed tumor growth and allowed more time . . . . The absence of effective Estramustine increased the risk that the time of progression was faster than it otherwise has been."[13] Eckerd has raised a *Daubert* challenge to Topolsky's proffered testimony, essentially arguing that his opinions are not reliable because they are based on speculation and insufficient factual data.

For purposes of the summary judgment motion, we shall assume that Topolsky overcomes the *Daubert* hurdle.[14] Nevertheless, the underpinnings of his opinion demonstrate that the plaintiff cannot prevail even if Topolsky were permitted to testify.[15] Topolsky does not know whether the drug was effective or ineffective when LoBianco took it.[16] After his review of the record evidence, Topolsky was unable to conclude how efficacious the Emcyt was, how much viability it had, how long it had been stored at room temperature and what the rate of degradation was before it was given to LoBianco or how

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[13] *Letter from Topolsky to Sellers, July 24, 2002* (*Pl. Resp. Eckerd's Mot. Preclude Testimony of David Topolsky, M.D.*, Ex. D).

[14] The plaintiff's case rises or falls on Topolsky's opinions. Without Topolsky's testimony, the plaintiff cannot establish causation. To give the plaintiff every benefit of the doubt, we did not rule on the *Daubert* motion and have considered Topolsky's report and deposition testimony.

[15] Dr. James O'Donnell, the plaintiff's pharmacology expert, does not save the plaintiff's case. He opines that Eckerd's handling of the Emcyt departed from the pharmaceutical standard of care. For the purpose of this motion, the deviation from the standard of care is deemed established. When he wrote that the drug had been ineffective when LoBianco took it, O'Donnell relied on the bald statement in Topolsky's report that the Emcyt was ineffective. *Letter from O'Donnell to Sellers, Jan. 20, 2004 (Pl. Resp. Mot. Summ. J.*, Ex. I). Topolsky, at his deposition which was taken after O'Donnell had issued his report, conceded that he could not conclude that the Emcyt had been ineffective. Instead, Topolsky specifically stated that he had *assumed* the Emcyt delivered to LoBianco had been ineffective. *Topolsky Aff., Mar. 29, 2004*, ¶ 5 (*Pl. Resp. Mot. Summ. J.*, Ex. N).

[16] *Stmt. of Uncontested Facts in Supp. Def. Joint Mot. Summ. J.* ¶ 22; *Topolsky Dep.* at 55-56 (*Joint Mot. Summ. J.*, Ex. B).

long LoBianco had kept it before using it.[17] According to the 2001 Physician's Cancer Chemotherapy Drug Manual and the drug manufacturer's own in-house data, Emcyt can remain stable at room temperature for up to 30 days, a fact that neither the plaintiff nor Topolsky disputes.[18] In the end, he admits, in the affidavit supplementing his report and deposition testimony,[19] that his opinion rests upon an unfounded assumption – that the drug was ineffective when taken.

There is no medical or empirical evidence that Emcyt alone or in combination with other drugs is effective against the cancer from which LoBianco suffered.[20] Consequently, Topolsky cannot state whether LoBianco would have lived longer or more comfortably had he taken properly stored Emcyt.[21] In fact, he admitted that LoBianco could have developed the same symptoms and "succumbed to the disease probably in the same way" had he received "active" Emcyt.[22] In sum, the plaintiff cannot establish that the Emcyt, with or without proper refrigeration, would have relieved LoBianco's pain, inhibited the progression

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[17] *Topolsky Dep.* at 56, 75 (*Joint Mot. Summ. J.*, Ex. B).

[18] *Supp'l Mot. Third-Party Def. United States (Sued as the "Veterans Administration Medical Center") for Substitution of the Parties and for Summ. J. on the Third-Party Claims*, Ex. 1-2.

[19] The affidavit was submitted to supply the magic words "to a reasonable degree of medical certainty" after Eckerd and McKesson challenged this purported failure in their joint motion. *Topolsky Aff., Mar. 29, 2004*, (*Pl. Resp. Mot. Summ. J.*, Ex. N).

[20] *Topolsky Dep.* at 66, 68-69 (*Joint Mot. Summ. J.*, Ex. B).

[21] *Stmt. of Uncontested Facts in Supp. Def. Joint Mot. Summ. J.* ¶ 26; *Topolsky Dep.* at 118-19 (*Joint Mot. Summ. J.*, Ex. B).

[22] *Stmt. of Uncontested Facts in Supp. Def. Joint Mot. Summ. J.* ¶ 30; *Topolsky Dep.* at 119 (*Joint Mot. Summ. J.*, Ex. B).

of the cancer or prolonged his life.[23]

Conclusion

Our search for any factual dispute on the causation issue that would enable the plaintiff to present her claim to a jury has been fruitless. There is nothing in the record, directly or inferentially, that could possibly lead a reasonable jury to find that the undisputed failure to refrigerate the prescribed drug caused LoBianco any harm. Therefore, because the plaintiff cannot establish an essential element of her negligence claim, we must grant the motion for summary judgment.

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[23] *Stmt. of Uncontested Facts in Supp. Def. Joint Mot. Summ. J.* ¶¶ 31-32; *Topolsky Dep.* at 66, 68-69, 116-124 (*Joint Mot. Summ. J.*, Ex. B).

One could assume from the complaint and Topolsky's report that the plaintiff is proceeding on an increased risk of harm theory. *Compl*. ¶ 33; *Letter from Topolsky to Sellers, July 24, 2002* (*Pl. Resp. Eckerd's Mot. Preclude Testimony of David Topolsky, M.D.*, Ex. D). This theory allows a case to be submitted to the jury, despite the inability of the plaintiff's medical expert to show a direct causal link, when the medical expert can show that the defendant's omission increased the risk of harm to the plaintiff. *Billman v. Saylor*, 761 A.2d 1208, 1212-13 (Pa. Super. 2000). Because this theory has been limited to medical malpractice cases, it is inapplicable to this case. *Myers v. Robert Lewis Seigle, P.C.*, 751 A.2d 1182, 1185 (Pa. Super. 2000).

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MCKESSON DRUG COMPANY	:	

ORDER

AND NOW, this 29th day of December, 2004, upon consideration of the Joint Motion for Summary Judgment of Defendant Eckerd Corporation and Third-Party Defendants McKesson Corporation, Pharmacia & Upjohn Company, and United States of America (Document No. 48), and the plaintiff's response, and after oral argument, it is **ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED as follows:

1. **JUDGMENT IS ENTERED** in favor of defendant Eckerd Corporation and against the plaintiff; and,

2. Defendant Eckerd Corporation's complaint against Third-Party Defendant McKesson Drug Company is **DISMISSED**.[1]

/s/
TIMOTHY J. SAVAGE, J.

[1] Eckerd filed a third-party complaint against McKesson. Because judgment is entered in favor of Eckerd, Eckerd's claims against McKesson are moot.